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Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General*

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 15/15, 19/19, 22/8 and 25/7.

* The present document was submitted late to incorporate comments received following consultations with civil society stakeholders.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

The present report is the fifth annual report submitted to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

The key activities undertaken by the Special Rapporteur from September 2014 to June 2015 are listed in section II of the report. In section III, the Special Rapporteur addresses the negative impact of counter-terrorism legislation and other measures on civil society. The report concludes with a series of recommendations.

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I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, pursuant to Assembly resolution 68/178 and Human Rights Council resolutions 15/15, 19/19, 22/8 and 25/7. It describes the activities of the Special Rapporteur carried out from September 2014 to June 2015. It then examines the negative impact of counter-terrorism legislation and other measures on civil society. The report concludes with a series of recommendations.

II. Activities relating to the mandate

2. The activities carried out by the Special Rapporteur from the issuance of his previous report to the General Assembly (A/69/397) until 23 October 2014 are listed in his most recent report to the Human Rights Council (A/HRC/29/51). Since then, the Special Rapporteur has participated in the activities set out below.

3. On 16 June 2015, the Special Rapporteur participated in the joint meeting of all three dimension committees of the Organization for Security and Cooperation in Europe (OSCE), organized by OSCE in Vienna.

4. On 22 June 2015, the Special Rapporteur presented his annual report (A/HRC/29/51) to the Human Rights Council at its twenty-ninth session in which he drew attention to the human rights challenges posed by the fight against the Islamic State in Iraq and the Levant. He also held an interactive dialogue with the Council on the key findings and recommendations contained in the report.

5. On 30 June 2015, during the twenty-ninth session of the Human Rights Council, the Special Rapporteur participated in a panel discussion on the topic "The effects of terrorism on the enjoyment by all persons of human rights and fundamental freedoms". The discussion was held pursuant to Council resolution 28/17.

6. Since he last reported to the General Assembly, the Special Rapporteur has continued to take action, individually or jointly with other mechanisms, including at the regional level, in response to communications, concerns and allegations received from individuals and organizations. He has continued to actively pursue dialogue with Governments, including by sending requests and reminders of requests for official visits. He regrets that despite long-standing requests, invitations were not received during the period under consideration. However, he is confident that invitations will soon be forthcoming.

III. Impact of counter-terrorism measures on civil society

A. Introduction

7. National and international non-governmental organizations (NGOs) can be key actors in effective counter-terrorism strategies. They have the ability to reach out to local communities, to provide assistance in protecting and promoting human rights, and to provide legal assistance. They give a voice to disaffected or marginalized

sectors of society, promote the needs of those who are politically, economically or socially excluded and deliver humanitarian relief in areas affected by conflict. Civil society groups are often critical to the implementation of development initiatives whether through local delivery of emergency aid or by contributing to the adoption of innovative long-term solutions to complex and persistent development problems. A vibrant civil society ensures that the voices of the vulnerable and marginalized are meaningfully included in the initiatives that have an impact on their civil, political and socioeconomic aspirations.[1] In a very tangible sense, the work of civil society groups thus makes a direct contribution to addressing the conditions conducive to the spread of terrorism, as identified by the General Assembly in the Global Counter-Terrorism Strategy (General Assembly resolution 60/288, annex).

8. Civil society can also play a distinct — but equally important — role in countering the appeal of violent extremism. Many NGOs now conduct programmes aimed specifically at promoting strategies to counter the appeal of violent extremism, or include such a dimension in their work. More generally, the civil society sector provides alternatives to those who may be tempted towards an extremist agenda by promoting civic outlets for addressing their grievances.[2] Through direct connection with marginalized populations and minority groups, and through programmes aimed at poverty reduction, peacebuilding, humanitarian assistance and the promotion of human rights and social justice, civil society can contribute significantly to global efforts to contain the spread of terrorism (see A/HRC/23/39, para. 26).[3]

9. In recent years, however, the space in which civil society groups are able to operate effectively has been radically reduced. The Human Rights Council has noted its grave concern that "in some instances, national security and counter-terrorism legislation and other measures, such as laws regulating civil society organizations, have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law" (see Human Rights Council resolution 25/18). In his opening statement at the thirtieth session of the Human Rights Council, on 14 September 2015, the High Commissioner for Human Rights stressed the role of civil society in providing a space for ordinary people to share grievances, to work towards solutions and to overcome common problems — resulting in healthier, more secure and more sustainable States.[3] The High Commissioner reported that the list of States which had taken "extremely serious steps to restrict or persecute the voices of civil society" was now so long that they could not be listed in his statement to the Council, a situation he described as devastating. Noting that States that restricted the space in which civil society could operate denied themselves the benefits of public engagement and undermined national security, national prosperity and collective progress, the High Commissioner elaborated on the scale of the problem in the following terms:

> Overly restrictive legislation is enacted to limit the exercise of public freedoms and work by civil society organizations. In many situations, the

[1] See the joint press release, "A central role for civil society is the only way to guarantee inclusive post-2015 development goals", 18 May 2015.

[2] See Cordaid, *Friend Not Foe: Opening Spaces for Civil Society Engagement to Prevent Violent Extremism*, May 2011.

[3] See more at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16414&LangID=E#sthash.S10Oubdl.dpuf.

voices of minority communities are suppressed and their activists and advocates are crushed. Women human rights defenders are targeted for specific attacks, often grounded in harmful and outdated stereotypes of women's so-called "place". Measures are taken to sharply restrict the democratic space online, including blocking of websites and mass surveillance.

10. Among the States that have recently adopted repressive measures permitting mandatory registration or even disbandment of civil society groups on grounds of national security or foreign funding are Cambodia, China, Ecuador, Egypt, Hungary, India, Israel, the Russian Federation and Uganda. The international crackdown on civil society space is not, however, limited to States that have adopted repressive legislation directly targeting the NGO sector. Many of the international and national measures aimed at countering terrorist financing and criminalizing material support for terrorism have had the indirect effect of restricting the space in which humanitarian and human rights NGOs are able to operate. The aim of the present report is to examine the ways in which civil society has been affected by international and national counter-terrorism measures, which have either intentionally targeted civil society groups, or have enabled Governments to clamp down on NGOs using counter-terrorism and national security to provide a veil of legitimacy for the suppression of legitimate human rights and humanitarian initiatives.[4]

11. The Special Rapporteur recalls that acts of terrorism can never be justified and that States have not only the right, but also the duty, to protect individuals within their jurisdiction from threats to their lives and physical integrity from acts of terrorism. Any effective counter-terrorism strategy must include measures to address the financing of terrorism and to prevent organizations and groups from providing financial and other support for acts of terrorism or for terrorist groups. At the same time, all measures adopted must comply with States' international obligations, including human rights and humanitarian law obligations. Given the decisive role of civil society in countering terrorism and extremism, States have a duty to protect civil society and the rights that are critical to its existence and development.

12. The right to freedom of association enshrined in article 22 of the International Covenant on Civil and Political Rights is one of the cornerstones of a democratic society.[5] Limitations can be justified only if they are prescribed by law, pursue a legitimate aim and are proportionate and necessary to achieve the aim. In the very rare situation of an emergency that threatens the life of the nation, derogations from this right are not prohibited under the Covenant. However, as the former Special Rapporteur has pointed out, States should rarely have the need to resort to derogations from the right to freedom of association (or other qualified rights), since the relevant limitations clauses will usually provide a sufficient and appropriate basis for determining the limits of permissible interference with the protected right (see A/61/267, para. 53). Critical to the existence, effectiveness and independence of an organization is the question of access to resources. For organizations that are involved in the delivery of services or assistance, access to

[4] The Special Rapporteur wishes to express his sincere thanks to Anne Charbord, Senior Legal Adviser to the Special Rapporteur on the promotion and protection of human rights while countering terrorism, for her contribution to the preparation of the present report.

[5] The legal framework has been examined in depth by other special procedures mandate holders. See A/HRC/20/27, paras. 12-21, and A/64/226, paras. 7-30.

resources also has a significant impact on the recipients. Importantly, the right to seek, receive and use resources — human, material and financial — from domestic, foreign and international sources is also protected under international law, as part of the right to freedom of association (see A/HRC/23/39, paras. 8-18). This is also reflected in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (see General Assembly resolution 53/144, annex, art. 13).

B. Restricting civil society space through national counter-terrorism legislation

13. In its resolution 1373 (2001), adopted under Chapter VII of the Charter of the United Nations, the Security Council requires all States to, inter alia, criminalize terrorist acts, acts of support for or in preparation of terrorist offences, and the financing of terrorism. Together with the obligation of States to report on national implementation of the resolution, the setting up of a subcommittee of the Council to monitor implementation, and with only a passing reference to human rights, this resolution was taken by many States as an obligation to adopt stringent counter-terrorism legislation, often under "emergency" procedures, in the absence of sufficient consultations with key stakeholders and respect for thorough parliamentary procedures.

14. It is of concern to the Special Rapporteur that despite a shift in the approach taken by the United Nations to counter terrorism, based on the recognition that a response confined to security alone is insufficient[6] (as reflected in the Global Counter-Terrorism Strategy (see General Assembly resolution 60/288), and the inclusion of a human rights clause by the Security Council),[7] States continue to adopt counter-terrorism legislation which raises serious human rights concerns.[8] In particular, the Special Rapporteur notes that many of the measures taken or envisaged by States violate the principle of legality by containing overly broad and vague definitions of terrorism. As the former Special Rapporteur emphasized, the adoption of overly broad definitions of terrorism carries the potential for deliberate misuse — including as a response to claims and social movements of indigenous peoples — and unintended human rights abuses.[9] Unclear, imprecise or overly broad definitions can be used to target civil society, silence human rights defenders, bloggers and journalists, and criminalize peaceful activities in defence of minority, religious, labour and political rights (see A/HRC/10/3/Add.2, para. 6, A/HRC/16/51, paras. 26-28, and A/HRC/25/59/Add.2, para. 42).

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[6] See Security Council resolution 2178 (2014): "Recognizing also that terrorism will not be defeated by military force, law enforcement measures and intelligence operations alone, and underlining the need to address the conditions conducive to the spread of terrorism, as outlined in pillar I of the United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288)".

[7] See, for example, Security Council resolution 1456 (2003), para. 6.

[8] See, for example, Australia, Brazil, Canada, Chile, China, Egypt, Ethiopia, France, Kenya, Pakistan, the Russian Federation, Saudi Arabia, Tunisia and the Bolivarian Republic of Venezuela.

[9] See A/HRC/16/51, para. 26. See also the report on the mission to Chile of the Special Rapporteur on the promotion and protection of human rights while countering terrorism (A/HRC/25/59/Add.2).

15. In addition, much of this new or envisaged legislation brings restrictions to rights that are essential to the existence of civil society.[10] Texts that criminalize "encouraging", "advancing" or "supporting" acts of terrorism, "justifying" or "glorifying" terrorism, and "inciting" the commission of a terrorist act must be properly defined, and the actus reus and mens rea requirements of the offences they create must be narrowly circumscribed to meet the tests of necessity and proportionality. Similarly, including wording such as "changing the constitutional order", "compromising national unity" or "social peace", "disturbing the public order" or "insulting the reputation of the State or its position", in the absence of other elements of serious crimes such as the use of lethal violence, can have a serious impact on a number of human rights, including freedom of expression, freedom of association and freedom of assembly. Furthermore, laws that criminalize the publication of "inaccurate information" or "statements" about counter-terrorism operations, or information that "contradicts" official statements or "that is likely to be misunderstood" are (in addition to being serious infringements of the freedom of expression and information) serious impediments to ensuring the accountability of government officials and security forces.

16. Mass surveillance powers, often justified on counter-terrorism grounds, have been used to target civil society groups, human rights defenders and journalists in a number of States. The Special Rapporteur has previously examined the impact of some of these measures on the right to privacy (A/69/397; see also A/HRC/27/37 and A/HRC/28/28). Article 17 of the International Covenant on Civil and Political Rights imposes on States the obligation to respect the privacy and security of all communications, including digital communications. This implies in principle that individuals and organizations have the right to share information and ideas with one another without interference by the State, secure in the knowledge that their communication will reach and be read by the intended recipients alone. Measures that interfere with this right must by authorized by domestic law that is accessible and precise and that conforms with the requirements of the Covenant. They must also pursue a legitimate aim and meet the tests of necessity and proportionality.

C. Impact of provisions on countering the financing of terrorism on civil society

17. The need to prevent the financing of terrorism is a key aspect of any effective counter-terrorism strategy. Adopting national legislation to combat the financing of terrorism is an international legal obligation of many States, at least under the International Convention for the Suppression of the Financing of Terrorism,[11] Security Council resolution 1373 (2001) and the sanctions regime regarding Al-Qaida, established by the Security Council in its resolution 1267 (1999). These regimes have been used to justify measures that have an impact on civil society groups on the basis of a perceived risk that such groups can be used, wittingly or unwittingly, as a means of providing support to terrorist organizations. This connection can first be found in an interpretative note to a recommendation issued by the Financial Action Task Force, which specifically deals with the financing of

[10] See the analysis carried out in 2003 by the former Special Representative of the Secretary-General on human rights defenders, Hina Jilani (A/58/380).

[11] Adopted by the General Assembly in its resolution 54/109; entered into force on 10 April 2002.

terrorism and non-profit organizations (NPOs).[12] In its original form, the interpretative note stated in unqualified terms that it has been "demonstrated that terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and terrorist activity".[13]

18. The Financial Action Task Force, set up in 1989 on an initiative of the Group of 7, is an intergovernmental organization whose initial aim was to develop policies to combat money-laundering.[14] In 2001 its mandate was expanded to include the financing of terrorism. Its current objectives are to set standards and to promote effective implementation of legal, regulatory and operational measures for combating terrorist financing, and to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. The Task Force currently has 40 recommendations,[15] which are intended to be implemented at the national level through legislation and other legally binding measures, and are complemented by interpretative notes,[16] a set of best practices,[17] and a *Handbook for Countries and Assessors*. Implementation of the recommendations by States is monitored through mutual evaluations, in which States are rated, from "compliant" to "non-compliant".

19. Recommendation 8 of the Task Force, which deals specifically with NPOs, requires States to undertake a review of their legislation pertaining to such organizations to ensure that they cannot be misused: (a) by terrorist organizations posing as legitimate entities; (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations. Importantly, this recommendation aims to address terrorist financing and what is more broadly described as "material

[12] Defined in the Financial Action Task Force glossary as "a legal person or arrangement or organization that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of 'good works'".

[13] Specifically, the Task Force identified five categories of possible abuse of non-profit organizations by terrorist entities: (a) diversion of funds; (b) affiliation with a terrorist entity; (c) support for recruitment; (d) abuse of programming; (e) false representation and "sham" non-profit organizations. See Financial Action Task Force (FATF), *Risk of Terrorist Abuse in Non-Profit Organisations*, 2014, p. 5 and paras. 75 and 91-124.

[14] In their economic declaration of 1989 the G-7 countries resolved to "convene a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance".

[15] The original recommendations and the eight special recommendations on the financing of terrorism were revised several times and consolidated in 2012. "In doing so, the FATF made permanent a regime developed in exceptional circumstances". See Ben Hayes, "How international rules on countering terrorism impact civil society", Transnational Institute, 8 May 2013.

[16] The Task Force introduction to the recommendations states that "the FATF standards comprise the Recommendations themselves and their Interpretative Notes, together with the applicable definitions in the Glossary".

[17] See FATF, *Best Practices: Combating the Abuse of Non-Profit Organisations (Recommendation 8)*, June 2015.

support".[18] In order to prevent abuse of NPOs and to identify and take effective action against those NPOs that are exploited or actively support terrorists or terrorist organizations, States are required to adopt a number of measures, although the same measures need not apply to all NPOs.[19] States should adopt measures regarding the supervision and monitoring for the entire NPO sector,[20] which should be commensurate with the risks identified through a national review of the NPO sector and a national risk assessment.

20. The Task Force noted that NPOs most at risk of abuse for terrorist financing are those engaged in "service activities" (housing, social services, education, or health care). Those involved in "expressive activities" (sports and recreation, arts and culture, interest representation or advocacy, such as political parties, think tanks and advocacy groups) were considered lower risk. The Task Force also noted that the key variable is the proximity to an active terrorist threat, which does not always correspond to geographic areas of conflict or low-governance, and the principal considerations for determining which NPOs are at higher risk of abuse are the value of their resources or activities to terrorist entities and the proximity to an active terrorist threat that has the capability and intent to abuse NPOs.[21]

21. The interpretative note to recommendation 8 highlights the "vital role" of NPOs, in particular their efforts in providing "essential services, comfort and hope to those in need around the world". Consequently, "[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities". Such measures should promote transparency and engender greater confidence that charitable funds and services reach intended legitimate beneficiaries. Actions taken by Governments should "to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity".

22. The Special Rapporteur notes that while opportunities for abuse exist[22] and there are examples in which the financing of terrorism through civil society has been established,[23] several key stakeholders have put the scope of the problem in perspective. The World Bank has recognized that the amounts involved represent only a fraction of a percentage of total NPO funds.[24] The Government of the United Kingdom of Great Britain and Northern Ireland, in its review of the charitable sector in 2007, noted that its assessment, together with law enforcement and intelligence

[18] See the references to "funds and other assets" in the interpretative note to recommendation 8, as well as the FATF publication, *Risk of Terrorist Abuse*, para. 29, which states: "Recommendation 8 does not limit itself to a narrow definition of terrorism financing, but also focuses on what is described as material support — as defined in the FATF definition of 'funds and other assets,' which includes 'financial assets, economic resources, property of every kind'".

[19] See the interpretative note to recommendation 8 and the June 2015 Best Practices guidelines. See also Emile van der Does de Willebois, "Nonprofit organizations and the combatting of terrorism financing: a proportionate response", World Bank Working Paper No. 208, chap. 2; FATF, *Risk of Terrorist Abuse*, chap. 4; Victoria Metcalfe-Hough, Tom Keatinge and Sara Pantuliano, "UK humanitarian aid in the age of counter-terrorism: perceptions and reality", HPG, March 2015, p. 1.

[20] Meaning all of those entities falling within the scope of the Task Force definition of an NPO.

[21] See FATF, *Risk of Terrorist Abuse*, paras. 14 and 80.

[22] See the 2009 report of the Counter-Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism, paras. 63-64.

[23] See van der Does de Willebois, "Nonprofit organizations", chap. 2; and FATF, *Risk of Terrorist Abuse*, chap. 3.

[24] See van der Does de Willebois, "Nonprofit organizations".

agencies, was that "the scale of terrorist links to the charitable sector is extremely small in comparison to the size of the charitable sector",[25] and in 2015 the Joint Committee on the Draft Protection of Charities Bill of the United Kingdom confirmed that "[t]he consensus of opinion is that abuse, distinct from honest mistakes and persistent mismanagement, is rare in the charity sector".[26] For its part, the United Nations Counter-Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism noted that "[i]t is important to be realistic about the actual use of this sector for terrorism financing. As a percentage of the total NPO financial flows, [terrorism funding]-related funds are very small".[27] It also recommended that States "avoid rhetoric that ties NPOs to terrorism financing in general terms because it overstates the threat and unduly damages the NPO sector as a whole."[28]

23. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that "very few, if any, instances of terrorism financing have been detected as a result of [civil society organization]-specific supervisory measures", and states that "recommendation 8 does not adequately take into account that States already have other means, such as financial surveillance and police cooperation, to effectively address the terrorism financing threat" (see A/HRC/23/39, para. 25). A study carried out by the Financial Action Task Force in 2014 corroborates this analysis.[29] It concluded that "the detection of terrorist abuse and risk within the NPO sector is essentially accomplished by accessing and assessing different types of information from different sources". This information includes NPO regulatory information, which was used in 68 per cent of the cases in which abuse was detected. However, in no case was NPO regulatory information the sole means used to detect abuse;[30] nor was it the most commonly used means to detect abuse.[31]

24. These findings do not provide a compelling argument to justify the extensive requirements that States must fulfil to comply with Task Force recommendation 8; nor do they address the concern that these requirements have in fact been misused by States that wish to curtail the existence of civil society for political reasons. Indeed, despite recognition by the Task Force of the importance of the role of civil society and its insistence that the measures adopted should not disrupt or discourage

[25] United Kingdom Home Office and Her Majesty's Treasury, *Review of Safeguards to Protect the Charitable Sector (England and Wales) from Terrorist Abuse: Summary of Responses and Next Steps*, December 2007.

[26] Report of the Joint Committee on the Draft Protection of Charities Bill, February 2015, para. 37.

[27] See the 2009 report of the Counter-Terrorism Implementation Task Force Working Group on Tackling the Financing of Terrorism, para. 64.

[28] Ibid., recommendation 65.

[29] FATF, *Risk of Terrorist Abuse*, chap. 4.

[30] Open source information was used in 96 per cent of the cases in which abuse was detected, financial intelligence in 49 per cent of the cases, national security intelligence in 63 per cent of the cases, law enforcement information in 58 per cent of the cases, and foreign information in 6 per cent of the cases.

[31] Note that open source information was used in 96 per cent of the cases in which abuse was detected.

legitimate charitable activities,[32] recommendation 8 has proved to be a useful tool for a number of States as a means of reducing civil society space and suppressing political opposition.[33]

25. While the measures States are asked to implement are aimed at countering the financing of terrorism, they do not focus on financing per se. Instead, they aim to regulate the functioning of civil society, through a range of measures most of which have an impact on freedom of association. According to the Task Force, the regulation of NPOs should depend on variables such as size, wealth and potential for abuse. In practice, such distinctions may be difficult to implement, as many NGOs, including human rights NGOs, do not fall squarely within a single category and are, for example, involved in both advocacy and programme delivery. Some States have adopted wholesale measures that strictly regulate civil society. Such legislation typically includes an obligation to register, burdensome, complex or varying procedures and required documents for the registration, which in turn increase the likelihood that the registration be denied, often together with limited ability to appeal the refusal, limited ability to obtain funding from abroad and the criminalization of various forms of membership of unregistered groups.[34]

26. The absence in recommendation 8 of any reference to the right of freedom of association (and its corollary, the ability to access financial resources) and to the need to respect the principles of legality, proportionality, necessity and non-discrimination, has lent a veneer of legitimacy to States that have adopted legislation without due respect for their international human rights obligations. The Special Rapporteur concurs with the conclusion of the Special Rapporteur on the rights to freedom of peaceful assembly and of association that recommendation 8 "fails to provide for specific measures to protect the civil society sector from undue restrictions to their right to freedom of association by States asserting that their measures are in compliance with FATF recommendation 8".[35] In addition, the Special Rapporteur notes that the monitoring bodies of the Task Force could have played a key mitigating role by highlighting in their mutual evaluations areas where national legislation is at variance with international human rights law. In practice, in its peer review processes, the Task Force has rarely criticized overregulation and

[32] See Counter-Terrorism Implementation Task Force Working Group meeting on preventing abuse of the non-profit sector for the purposes of terrorist financing, key observations of the organizers, 2011, para. 7, and FATF, *Best Practices*, para. 18; see also Task Force recommendation 1 (the measures adopted should be commensurate to the risks) and the Task Force approach to regulation, above.

[33] See Special Rapporteur on the rights to freedom of peaceful assembly and of association, who warned against "the implementation of restrictive measures — such as FATF recommendation 8 — which have been misused by States to violate international law" (A/HRC/23/39, para. 25).

[34] For an overview, see Ben Hayes, "Counter-terrorism, policy laundering and the FATF: legalizing surveillance, regulating civil society", Transnational Institute, 2012.

[35] Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/23/39, para. 25). See also Thomas Carothers and Saskia Brechenmacher, "Closing space: democracy and human rights support under fire", Carnegie Endowment for International Peace, p. 29.

lack of respect for human rights,[36] focusing instead on cases of insufficient regulation.[37]

27. The Special Rapporteur notes with interest, however, that the Task Force has very recently adopted a more nuanced approach in its revised best practices for the implementation of recommendation 8. For the first time it has stated that "as a matter of principle, complying with the FATF recommendations should not contravene a country's obligations under (...) international human rights law to promote universal respect for, and observance of, fundamental human rights and freedoms, such as freedom of expression, religion, or belief, and freedom of peaceful assembly and of association".[38] The Special Rapporteur welcomes this significant development and urges States to take it into consideration in adopting any legislation to regulate civil society. He further states that Task Force monitoring bodies should apply this guidance in evaluating the way in which States have implemented recommendation 8 at the national level so as to include a human rights compliance assessment.

28. The Special Rapporteur recognizes that an obligation on the part of NGOs to register with official bodies[39] does not necessarily, in itself, violate the right to freedom of association. Nonetheless, in the absence of evidence of criminal wrongdoing, any such obligation should not interfere with the ability of NGOs to function (see A/64/226, para. 59), as the right to freedom of association cannot be abrogated on the grounds of non-registration alone (see A/HRC/20/27, para. 56). This point is particularly important when the procedure for establishing an association is burdensome and subject to administrative discretion (ibid.). During the procedure to establish an association as a legal entity, government officials must act in good faith, in a timely and non-selective manner, and procedures should be simple, not unduly onerous, and carried out expeditiously (ibid., para. 57). Notification procedures rather than prior authorization procedures comply better with international human rights law (ibid., para. 58). Any decision rejecting a submission or application must be clearly reasoned and duly communicated in writing to the applicant, and there should be an opportunity to challenge the decision before an independent and impartial court or tribunal (ibid., para. 61).

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[36] For an example where the reviewing body highlighted the State's "blanket approach" as not being justified by assessed Task Force risks, see ESAAM, Mutual evaluation report, Ethiopia, May 2015, para. 142. On the legislation, see United Nations High Commissioner for Human Rights, press release, "Ethiopia: Pillay condemns crackdown on journalists, increasing restrictions on freedom of expression", available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14555&LangID=E#sthash.2waXGpXx.KVNcKEQ8.dpuf.

[37] See, for example, FATF/GAFI, second mutual evaluation report, Russian Federation, 2008, para. 720, and Human Rights Watch, *Choking on Bureaucracy, State Curbs on Independent Civil Society Activism*, vol. 20, No. 1(d), February 2008. See also Human Rights Committee, concluding observations, 2009, CCPR/C/RUS/CO/6, para. 26, which gives the State a "partially compliant" rating, in part owing to its insufficient enforcement of the rules. See also MENA FATF, mutual evaluation report, Kingdom of Saudi Arabia, 2010, para. 798, which states "[t]he NPO sector appears to be encapsulated in a comprehensive regulatory and supervisory system that outclasses many other systems of other jurisdictions and that appears to be rather effective", and gave the State a "largely compliant" rating. See Amnesty International, Saudi Arabia's ACPRA: How the Kingdom silences its human rights activists", MDE 23/025/2014, October 2014, p. 5, and NGO Law Monitor: Saudi Arabia, available at: www.icnl.org/research/monitor/saudiarabia.html>. See also A/HRC/11/23, para. 35.

[38] FATF, *Best Practices*, para. 22.

[39] See CCPR/C/102/D/1478/2006.

29. Many States have adopted legislation that imposes obligations to maintain information on the purpose and objectives of NPO activities; to issue annual statements with detailed breakdowns of incomes and expenditure; and to maintain records of domestic and international transactions to show that funds have been spent in a manner that is consistent with the purposes and objectives of the organization. The Special Rapporteur recalls the principle that civil society organizations should be able to operate freely. States should not unduly obstruct the exercise of freedom of association and organizations should not be subject to State scrutiny into the management and internal governance of the organization. In practice, this means that while independent bodies may be able to examine records as a means of ensuring transparency and accountability (ibid., para. 65), the reporting obligations of organizations should be simple, uniform and predictable (see A/64/226, para. 117). Extensive scrutiny by tax authorities, amounting to an abuse of fiscal authority, should be strictly prohibited (ibid., para. 120). In practice, organizations should not be required to spend a significant portion of their resources on record keeping or vetting members of partner organizations, a requirement that can be particularly burdensome for organizations on small budgets, or working in areas affected by conflict or disaster.[40]

30. Of particular concern is the requirement in the Task Force interpretative note that appropriate State authorities should monitor NPO compliance with the requirements of recommendation 8 and apply effective "dissuasive sanctions" for any violation (including freezing of accounts, removal of trustees, fines, decertification, delicensing and deregistration).[41] The Special Rapporteur considers that non-compliance with the law governing the registration or regulation of civil society organizations should not, in itself, be criminalized (in the absence of any evidence of independent criminal wrongdoing). Any failure to comply should first lead to a warning and then to an opportunity to correct administrative infractions (see A/64/226, para. 118). In the absence of clear and compelling cause, State authorities should not be entitled to condition any decisions and activities of the association, reverse the election of board members, or enter an association's premise without notice (see A/HRC/20/27, para. 65). Recourse to such measures should only be permissible where they are strictly necessary, proportional to a genuine legitimate aim (national security or the prevention of crime) and where less intrusive measures would be clearly insufficient (ibid., para. 75). In addition, such measures should be subject to ex ante review by an independent and impartial judicial body (see A/64/226, para. 114).

D. Impact on civil society of laws criminalizing material support for terrorism

31. The adoption of binding international and regional instruments proscribing material support for terrorism, together with overbroad national legislation implementing those obligations or otherwise criminalizing such support, can pose a significant threat to civil society organizations, some of whose activities may — unwittingly — constitute indirect material support according to the definitions

[40] See also van der Does de Willebois, "Nonprofit organizations".

[41] See interpretative note point 5 (b) (vii).

adopted. NGOs have been constrained by real or perceived threats of prosecution, which in turn can have a serious impact on recipients and beneficiaries.

32. Security Council resolution 1373 (2001) and the International Convention for the Suppression of the Financing of Terrorism both require States to adopt measures at the national level to prohibit funding and material support being made available for the purposes of carrying out terrorist acts. In particular, the Council, in paragraph 1 (d) of resolution 1373 (2001), decided that States shall prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons. Resolution 1373 (2001), paragraph 1 (c), has also been the basis on which national Governments and regional entities have set up sanction regimes applicable to individuals and entities designated as terrorist that supplement the United Nations Al-Qaida sanctions regime under Council resolution 1267 (1999), which the Special Rapporteur has examined elsewhere (see A/67/396 and A/HRC/29/51). Importantly, the sanctions regime provides for humanitarian exemptions on a case-by-case basis, whereas there is no mention in resolution 1373 (2001) of any such exemptions, thus leaving it to individual States to decide whether to include them in their own national regimes.

33. Many States have now adopted legislation criminalizing material support.[42] As a result, donors now frequently include counter-terrorism clauses in humanitarian grant and partnership agreement contracts, requiring NGOs to provide onerous guarantees that their funds are not used to benefit terrorists or to support acts of terrorism.[43] Vetting processes have also been introduced.[44] Added complexity arises from the number of laws that may have an impact on civil society acting nationally and abroad; the definition of terrorism in those laws, with varying levels of broadness and clarity; the diversity of the prohibitions that can have an impact on NGOs; the differing levels of required intent;[45] and the varying scope of application of the laws *ratione loci*.[46]

34. Some jurisdictions also provide non-criminal sanctions that may affect civil society personnel, including their immigration status.[47] Exemptions for humanitarian purposes exist under certain legal regimes,[48] while under others such

[42] For a thorough examination, see Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, and Harvard University Program on Humanitarian Policy and Conflict Research (HPCR) Working Paper, "Humanitarian action under scrutiny: criminalizing humanitarian engagement", February 2011.

[43] See Mackintosh and Duplat, *Study of the Impact*, pp. 47 ff. See also Harvard University, Counterterrorism and Humanitarian Engagement Project.

[44] See HPCR Working Paper, "Humanitarian action under scrutiny", p. 23.

[45] See Mackintosh and Duplat, *Study of the Impact*, and Human Rights Watch, "In the Name of Security: Counterterrorism Laws Worldwide since September 11", p. 32.

[46] See Mackintosh and Duplat, *Study of the Impact*.

[47] See HPCR Working Paper, "Humanitarian action under scrutiny", pp. 22-23.

[48] See part 5.3, division 102.8, of the Australian Criminal Code. See sects. 9 and 10 of the New Zealand Terrorism Suppression Act 2002.

exceptions are very limited[49]. In some jurisdictions, it is possible to obtain a licence from national authorities to deal with proscribed groups for the purpose of providing aid of a humanitarian nature.[50] In other cases, the Government can waive some of its provisions to allow humanitarian operations for certain organizations.[51]

35. While the practical challenges encountered by NGOs working in areas controlled by designated terrorist groups — such as Mali, Nigeria, Pakistan, the Philippines, Somalia, Palestine and, more recently, in the Syrian Arab Republic — may be similar, the legal situation can vary greatly according to the overlapping and inconsistent requirements of different applicable regimes. Variables include: whether the non-State armed groups in control of territory are on international terrorism sanction lists, or on national and regional terrorist sanction lists; whether a humanitarian exemption has been granted directly by the Security Council, such as through resolution 1916 (2010);[52] where the NGO is registered and what the nationality of its staff is; where its funding comes from (noting that funding may come from various sources, each with its own requirements, and may also have been passed on from intermediary partners); and where the NGO is based (taking into consideration that national law also applies to the work undertaken by the NGO).

36. Many civil society groups fear that the laws on support to terrorism are often so broad and vague that they will end up being sanctioned for carrying out their activities even though they have taken every feasible precaution to avoid policies that could lead to the provision of indirect support for terrorist groups. This concern has been reinforced by the case of *Holder v. Humanitarian Law Project*,[53] in which

[49] In the United States of America, the provisions on providing material support to terrorists (18 USC 2339A) and to designated foreign terrorist organizations (18 USC 2339B) both provide for an exception for "medicine or religious materials" (see 18 USC 2339A (b) (1) and 18 USC 2339B (g) (4)). For a discussion on this exception, see Mackintosh and Duplat, *Study of the Impact*, and HPCR Working Paper, "Humanitarian action under scrutiny". See also attempts at broadening humanitarian exemption, with the draft bill "Humanitarian Assistance Facilitation Act", whose aim is, inter alia, to "exclude from the definition of 'material support or resources' (regarding foreign terrorist organizations) engaging in speech or communication with a terrorist organization to prevent or alleviate the suffering of a civilian population, including speech or communication to reduce or eliminate the frequency and severity of violent conflict and reducing its impact on the civilian population". Available at: www.govtrack.us/congress/bills/113/hr3526/summary.

[50] For Australia, see part 4, sect. 22, of the Charter of the United Nations Act 1945. For New Zealand, see sect. 10 of the Terrorism Suppression Act 2002.

[51] The Office of Foreign Assets Control of the United States Department of the Treasury can issue exemptions for humanitarian action in the form of general or specific licences, but they do not provide immunity against the criminal prohibition on providing material support or resources to terrorists. See Jessica Burniske, with Naz Modirzadeh and Dustin Lewis, Humanitarian Practice Network, "Counter-terrorism laws and regulations — what aid agencies need to know", No. 79, November 2014. For the specific example of Somalia, see Mackintosh and Duplat, *Study of the Impact*, pp. 79-80, and HPCR, Working Paper, "Humanitarian action under scrutiny", p. 21.

[52] Resolution 1916 (2010) provided that the targeted sanctions under Security Council resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia. The impact was that most organizations involved would not be in violation of the United Nations sanctions regime where resources were transferred to al-Shabaab. However, as the resolution did not lay down a terrorism sanctions regime and al-Shabaab was listed as a terrorist organization by several States, criminalization of the transactions to al-Shabaab could still occur on that basis. See Mackintosh and Duplat, *Study of the Impact*, pp. 75-76.

[53] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

the Supreme Court of the United States of America, in a 6 to 3 ruling, confirmed the constitutionality of the principal United States material support statute.[54] The Court held that providing training on humanitarian and international law, petitioning various representative bodies (including the United Nations) and engaging in political advocacy to organizations designated as foreign terrorist organizations by the Department of State[55] constituted "material support". In a ruling that has had a chilling effect on NGO operations, Chief Justice Roberts held that "material support" included initiatives that were intended to promote peaceable, lawful conduct, because such assistance could be "diverted" to advance terrorist objectives. This was said to be because a foreign terrorist organization introduced to the structures of the international legal system might use the information to "threaten, manipulate and disrupt". The purported rationale for this approach was that terrorist organizations were "so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct". The Chief Justice reasoned that since terrorist organizations do not maintain "organizational firewalls" between social, political and terrorist operations, or "financial firewalls" between funds raised for humanitarian activities and those used to carry out terrorist attacks, it must follow that any support constitutes material support, since it "frees up other resources within the organization that may be put to violent ends". A further reason given in the ruling was that training on the use of peaceful legal and political means for resolving disputes could help to "lend legitimacy" to terrorist groups and to provide a propaganda advantage, making it easier to recruit individuals and raise funds. Consequently, irrespective of their nationality, individuals working for civil society organizations anywhere in the world may now be prosecuted in the United States and incur up to 15 years imprisonment if they engage in one of the acts listed in the material support statute with an entity they knew was a designated foreign organization in the United States, or engaged in terrorist activity or acts of terrorism.[56] This ruling has a very significant potential impact on humanitarian, human rights and advocacy organizations around the world.[57]

37. Engagement for humanitarian purposes is recognized under international law[58] and humanitarian access is now commonly included in Security Council

[54] This case dealt with material support under 18 United States code section 2339 B, but material support contains the same elements under section 2339 A: "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself) and transportation".

[55] The Kurdish Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).

[56] With the exceptions referred to earlier.

[57] See HCPR Working Paper, "Humanitarian action under scrutiny", pp. 18-21, and Mackintosh and Duplat, *Study of the Impact*, pp. 40-42.

[58] See HPCR Working Paper, "Humanitarian action under scrutiny", pp. 4 ff.

resolutions.[59] The Special Rapporteur is concerned that despite this recognized principle of international law, the provision of legal training aimed at reducing the risk of harm to civilians in armed conflict and the provision of genuine humanitarian assistance in areas controlled by non-State armed groups can nonetheless give rise to criminalization. Engagement with designated terrorist groups where they control territory will likely include negotiating access to civilians living in areas under the control of the group or to making logistical arrangements, or providing humanitarian assistance to members of a designated group. It is then necessary to examine on a case-by-case basis the type of assistance provided to see whether it may fall under one or more of these interlocking, overlapping and extremely broad material support provisions.[60]

38. There are a number of other forms of contacts, involving financial and other transactions, that can have an impact on NGOs through national counter-terrorism legislation. These can include the payment for visas or entry permits, where territory is under the control of a terrorist group, or the payment of fees or "taxes" directly to the proscribed organization in order to be able to enter certain territory, to be able to deliver aid or to protect personnel.[61] In addition, the risk that some of the goods delivered in areas where terrorist groups are active may be diverted, or delivered to a local implementing partner that has ties with a listed terrorist group, can also be an important concern for NGOs.[62] It may not be possible for an NGO to vouch for all local implementing partners, individual employees and recipients. As highlighted by the Secretary-General, "[a]t the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians — even those groups that are proscribed in some national legislation".[63] As the Secretary-General went on to point out, the increasing appreciation by Member States of the importance of engagement for humanitarian purposes has yet to translate "into a

[59] See Security Council resolution 2139 (2014), in which the Council demanded that all parties: implement the 2 October 2013 statement by the President of the Council (S/PRST/2013/15), including through facilitating humanitarian relief operations, in accordance with international humanitarian law and the United Nations guiding principles of humanitarian emergency assistance; allow the delivery of humanitarian assistance to all affected areas; allow rapid, safe and unhindered humanitarian access for United Nations humanitarian agencies and their implementing partners, including across conflict lines and across borders to ensure that humanitarian assistance reaches people through the most direct routes; and respect the principle of medical neutrality, and recalled that under international humanitarian law, the wounded and sick must receive medical care and attention.

[60] See the case of *United States v. Shah*, 474 F.Supp.2d 492 (SDNY 2007), in which the Court seems to make a distinction between the provision of medicine and the provision of medical treatment, the latter being prohibited or not, depending under whose authority the medical care is dispensed, falling either under the exemption for the provision of medicine or the prohibition of material support through the provision of personnel. See also BBC Radio 4, "A Deadly Dilemma", in which a legal adviser to a large NGO explained the challenges caused by various national laws and various definitions of material support (transcript available at: www.bbc.co.uk/programmes/b047zk6z). See also Ashley Jackson and Abdi Aynte, HPG Working Paper, "Talking to the other side", 2013, p. 7.

[61] See the report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia (S/2013/413), para. 118. See also the report of the Draft Protection of Charities Bill Joint Committee, February 2015, para. 183. See also Jackson and Aynte, "Talking to the other side".

[62] See aforementioned transcript of BBC Radio 4, "A Deadly Dilemma".

[63] See S/2009/277, para. 45.

willingness to refrain from adopting measures that impede or, in some cases, criminalize engagement with non-State armed groups".[64]

39. One of the most worrying consequences of these developments is that humanitarian NGOs have been impacted in their ability to adhere to the guiding principles of neutrality, impartiality and independence. Studies show that the parameters of humanitarian action have been shifted so that programmes that are specifically designed to avoid contact with, or support to, a designated group (so as to limit the organization's exposure to criminal liability) have come to take preference over programmes that are designed to respond most directly and effectively to humanitarian needs.[65] Some measures at the international and national levels have also contributed to a perception that NGOs have been co-opted into official counter-terrorism initiatives, thereby limiting their ability to operate in certain areas, with certain Governments, or with certain groups.[66] At the international level, the listing by the United Nations of organizations as designated terrorist groups under the various targeted sanctions regimes has contributed to this trend. Reporting requirements, such as those imposed under Security Council resolution 1916 (2010), can also have a negative impact since they involve NGOs in the sanctions process and undermine their actual or perceived neutrality.[67] Moreover, the consequential vetting of NGOs by donors has an impact on how NGOs perceive their independence and on their ability to work in a climate of trust with local implementing partners.[68] The Special Rapporteur notes that this emerging trend, which draws NGOs into a broader counter-terrorism infrastructure, further constricts the space in which humanitarian groups are able to operate.[69]

40. The counter-terrorism measures referred to above have also contributed to a self-imposed restriction by civil society actors of their own space.[70] It is unsurprising that, given the complexities involved in operating in or around areas where terrorist groups are active, some NGOs have preferred to reorient their

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[64] See S/2010/579, para. 55.

[65] See Mackintosh and Duplat, *Study of the Impact*, pp. 72 and 84.

[66] For a general discussion, see Geneva Academy of International Humanitarian and Human Rights Law, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, 2011, pp. 15-16. See also Mackintosh and Duplat, *Study of the Impact*, p. 81; HPCR Working Paper, "Humanitarian action under scrutiny", p. 32; and Burniske, with Modirzadeh and Lewis, "Counter-terrorism laws and regulations", p. 3, and Jackson and Aynte, "Talking to the other side", p. 6.

[67] See Mackintosh and Duplat, *Study of the Impact*, p. 81, and HPCR Working Paper, "Humanitarian action under scrutiny", p. 31.

[68] See Burniske, with Modirzadeh and Lewis, "Counter-terrorism laws and regulations", p. 6. See also Neal Cohen, Robert Hasty and Ashley Wonton, "Implications of the USAID partner vetting system and State Department risk analysis and management system under European Union and United Kingdom data protection and privacy law, Counterterrorism and Humanitarian Engagement Project, Research and Policy Paper, March 2014.

[69] Another aspect is the possible involvement of government agencies in charge of regulating NGOs or charities in Governments' counter-terrorism strategies and national security agendas. See, for example, David Anderson, transcript of the evidence before the Draft Protection of Charities Bill Joint Committee [United Kingdom] on 2 December 2014 on the effect of anti-terrorism laws on charities, Q195. Available at www.data.parliament.uk/writtenevidence/committeeevidence.sev/evidencedocument/draft-protection-of-charities-bill-committee.

[70] See press conference, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 26 October 2010, cited in HCPR Working Paper, 2011, available at: www.un.org/press/en/2010/101026_Scheinin.doc.htm.

operations to areas where there are fewer risks of prosecution or have refused to take funding from certain donors. Part of this problem could be addressed through increased guidance, transparency and clarity on the scope and impact of counter-terrorism laws and policies.[71] This is a precondition for NGOs to be able to decide whether to undertake certain programmes and to develop appropriate risk-mitigating procedures.[72]

41. On a very practical level, NGO operations are increasingly constrained by restrictions on available funding in areas where terrorist groups are active[73] and by increased reliance on the part of donors on "safer" implementing partners, such as United Nations agencies and other international organizations, to the detriment of smaller or local NGOs.[74] Civil society groups have also highlighted the financial and resources implications of the increased time that is now spent on administrative requirements, complying — and proving compliance — with counter-terrorism material support legislation,[75] which in turn has an inevitable impact on their operational capabilities and thus impedes delivery to beneficiaries.[76]

42. Counter-terrorism concerns have also affected civil society access to financial services.[77] Many banks have implemented risk-averse protocols that go beyond the specific requirements of the Financial Action Task Force recommendations in order to shield themselves from any possible risk of liability under counter-terrorism legislation.[78] In effect, this means no longer processing transactions involving high-risk environments or actors.[79] Some NGOs have found that their ability to access financial services, including banking services, has been severely impaired, while

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[71] See Burniske, with Modirzadeh and Lewis, "Counter-terrorism laws and regulations", p. 7. See also Draft Protection of Charities Bill Joint Committee, February 2015, paras. 187-192.

[72] See Burniske, with Modirzadeh and Lewis, "Counter-terrorism laws and regulations", p. 7, Mackintosh and Duplat, *Study of the Impact*, p. 81, and HPCR Working Paper, "Humanitarian action under scrutiny", p. 114.

[73] See Mackintosh and Duplat, *Study of the Impact*, p. 82. For an example, in Somalia, where following the listing of al-Shabaab as a terrorist organization in 2008, "a single instance of diverted aid or payments to local authorities was now potentially a crime under US law for which both USAID and its implementing partners could be held accountable".

[74] Mackintosh and Duplat, *Study of the Impact*, p. 104.

[75] Ibid., pp. 72 and 103.

[76] Ibid., p. 103.

[77] Human Rights Council resolution 27/21: "Concerned that unilateral coercive measures have, in some instances, prevented humanitarian organizations from making financial transfers to States where they work".

[78] "The limited revenue that most INGOs may generate for a bank is not sufficient to justify the risks that banks believe doing business with INGOs will expose them to". See Humanitarian Policy Group, Working Paper, "UK humanitarian aid in the age of counter-terrorism: perceptions and reality", March 2015, p. 13.

[79] Banks "de-risk" and can subsequently "de-bank" high-risk clients. See *Financial Times*, "Regulation: bank counts the risks and rewards", Martin Arnold and Sam Fleming, 14 November 2014, available at: www.ft.com/cms/s/0/9df378a2-66bb-11e4-91ab-00144feabdc0.html#axzz3J2G48VEu. On the "risk of undermining the objectives of AML/CTF [anti-money laundering/counter-terrorism financing] regulation by driving money transfer through less transparent informal channels which perversely could lead to increased risk of money laundering and counter-terrorist financing with adverse effects on the security situation which motivates the very application of AML/CTF regulation in the first place", see The Commonwealth and La Francophonie, "Walking a tightrope: AML/CTF regulation, financial inclusion and remittances", Annual Commonwealth and Francophonie Dialogue with the G-20, Discussion Paper, 3.0, April 2015.

others have seen their bank accounts closed altogether. For NGOs operating in areas of conflict, the inability to access financial services can have very severe consequences, including delayed aid delivery and increased physical risk to staff and offices (with larger amounts of cash being transported and used). Moreover, transactions outside the banking sector are more difficult to trace and account for.[80] The Task Force has pointed out that financial institutions should not view NPOs as automatically high-risk simply because they operate in cash-intensive environments or in countries of great humanitarian need.[81]

43. As the Special Rapporteur on the rights to freedom of peaceful assembly and of association has pointed out, the restrictions faced by NGOs in countries deemed sensitive include the inability to open bank accounts, arbitrary closure of accounts, inordinate delays or termination of transactions, onerous obligations requiring detailed knowledge of donors and beneficiaries, and vulnerability to accusations of terrorist links. He recalled that such restrictions threaten both the operations of organizations and even their very existence, and concluded that the denial of banking facilities, including bank accounts and funds transfer facilities, without reasonable suspicion that the targeted organization or transaction constitutes support of terrorism or money-laundering, is incompatible with the right to freedom of association. The Special Rapporteur concurs with the view of the Special Rapporteur on the rights to freedom of peaceful assembly and of association that singling out organizations on the basis of stereotypical assumptions relating to characteristics, such as religion or the predominant race of the organization's membership or beneficiaries, constitutes unjustified discrimination and is prohibited under international law.[82]

44. The Special Rapporteur notes with interest the decision taken by the High Court in the United Kingdom in October 2013 to grant an interim injunction to prevent a bank from terminating the banking services it provided to a money service business.[83] Other relevant initiatives taken by the United Kingdom include the safer corridor pilot project, designed to protect remittance flows to Somalia, which focuses on the ability of NGOs to send money to support their own operations,[84] and the 2013 Guidance developed between banks and the humanitarian community to assist the latter in complying with various due diligence requirements.[85] Finally, in this context, the Special Rapporteur notes the recognition in some States of an

[80] See Burniske, with Modirzadeh and Lewis, "Counter-terrorism laws and regulations", pp. 8-9, and Humanitarian Policy Group, Working Paper, "UK humanitarian aid", pp. 6-7.

[81] FATF, *Best Practice*, 2015, paras. 68-70.

[82] See A/HRC/23/39/Add.1, paras. 84-85.

[83] While the legal basis for the decision was abuse of dominant position, the case refers to the importance of this money service business in transferring funds to Somalia, where no formal banking system exists, the fact that its customers included a number of international aid organizations and charities, and the clear social and humanitarian benefits associated with an efficient and properly regulated system for the transmission of money. United Kingdom High Court of Justice, *Dahabshiil Transfer Services Ltd v. Barclays Bank PLC*, [2013] EWHC 3379 (Ch).

[84] "Safer corridor pilot for UK-Somali remittances: stakeholder engagement summary, March 2015", available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/418688/15-03-20_SCP_Stakeholder_Engagement_Summary.

[85] Collaboration between the British Bankers' Association, the Disasters Emergency Committee and Freshfields Bruckhaus Deinger LLP, "Getting aid to Syria, sanctions issues for banks and humanitarian agencies", December 2013. Available at www.dec.org.uk/sites/default/files/pdf/getting_aid_to_syria.

emerging right to banking facilities which, where recognized, can benefit NGOs and other legal entities that have been deprived of bank accounts or have been refused banking services.[86]

IV. Conclusions and recommendations

45. **While States have a duty to protect all individuals from acts of terrorism, they also have a duty to protect civil society and the rights that are critical to its existence and development. Civil society groups play an important role in addressing the conditions conducive to the spread of terrorism, countering the appeal of violent extremism, protecting and promoting human rights and the rule of law, and delivering humanitarian relief. Counter-terrorism measures that have a negative impact on the ability of the NGO sector to operate effectively and independently are liable, in the absence of a compelling justification, to be ultimately counterproductive in reducing the threat posed by terrorism.**

46. **In order to ensure that in their efforts to counter terrorism, States do not adopt measures that could have a negative impact on civil society, the Special Rapporteur:**

(a) **Urges States to publicly recognize the essential role played by civil society in any effective counter-terrorism strategy;**

(b) **Urges States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds. Where counter-terrorism legislation can have an impact on a right that is critical to the existence and development of civil society, including the rights to freedom of association, expression and assembly, as well as the right to privacy, States should always ensure that the principles of necessity, proportionality and non-discrimination are respected. In addition, States should refrain from using language or adopting measures that could lead to the stigmatization of civil society;**

(c) **Recommends that any measure taken to implement recommendation 8 of the Financial Action Task Force fully complies with international human rights law, including the right to freedom of association, in all of its components. In particular, States should ensure that no one is criminalized for exercising the right to freedom of association in the context of lawful activities of an NGO and that any sanctions imposed do not deter individuals from exercising their right to association;**

(d) **Calls upon the Financial Action Task Force and its monitoring bodies to be fully cognizant of the impact of recommendation 8 on civil society in a number of countries. The Task Force should routinely take the human rights obligations of States into consideration when evaluating progress in implementing this recommendation through the adoption of a human rights compatibility assessment. It should also consider ensuring the presence of a human rights expert in all evaluation procedures;**

[86] See French *Code monétaire et financier*, art. L312-1.

(e) Urges States to ensure that measures to counter support to terrorism do not disproportionately prevent national and international organizations from carrying out their mandates. In particular, States should refrain from adopting measures that impede or criminalize essential humanitarian or human rights engagement with non-State armed groups that may be designated as terrorist or that control territory. Exceptions for such action should be explicitly adopted by States, regional and international organizations;

(f) Recommends that States and regional and international organizations increase their efforts to be transparent and to inform organizations regarding the content, scope and interpretation of their counter-terrorism legislation;

(g) Encourages States to ensure that humanitarian action is not compromised by counter-terrorism legislation and to recognize the key role played by human rights organizations and others in situations and areas where terrorist groups are active.